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November 7, 2016

The Honorable William Alsup
United States District Court
Courtroom 8, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *Evans, et al. v. Arizona Cardinals Football Club LLC, et al.*, No. C 16-01030-WHA

Dear Judge Alsup:

The undersigned, as counsel for Defendants in this case, submits this letter pursuant to Rule 26(c) and Paragraph 25 of the Court's Supplemental Order (ECF No. 45). The parties have been unable to resolve a dispute about Plaintiffs' demand for depositions of the owners of the Dallas Cowboys and Indianapolis Colts, Jerry Jones and James Irsay, each of whom is a high-level officer protected from harassing and unnecessary discovery under the "apex doctrine." Defendants respectfully request that the Court issue a protective order prohibiting or at least deferring these depositions.

Background

This case involves allegations that the plaintiffs and other retired professional football players whom they seek to represent suffered injury as a result of the improper administration to them of pain-relieving and other medications by team doctors and athletic trainers. To date, Plaintiffs have not taken the depositions of any of those physicians or trainers.

On October 17, 2016, Plaintiffs informed Defendants that, for some of the very first depositions in this case, they wished to depose Mr. Jones, owner, president, and general manager of the Cowboys, and Mr. Irsay, owner and CEO of the Colts. Plaintiffs asserted that Mr. Jones' deposition is warranted because he has made public statements in 2016 regarding the injury status of quarterback Tony Romo and other current Cowboys players, none of whom are members of the putative class, and because he has served on some league committees. Plaintiffs claim that Mr. Irsay's deposition is warranted because in 2014 he was arrested for driving while intoxicated while in possession of certain prescription painkilling drugs, which Plaintiffs assert might have come from a Colts team physician. These purported grounds for seeking harassing depositions of these apex witnesses are entirely meritless, particularly in light of Plaintiffs' failure to pursue alternative, less intrusive discovery

In meeting and conferring on this issue, Defendants requested that Plaintiffs articulate more fully their justification for these depositions and, at a minimum, first pursue other discovery, such as the depositions of less senior individuals with more direct, relevant knowledge. Plaintiffs refused to do either. (*See* Exs. A–C (meet and confer correspondence on this topic)).

Argument

Fed. R. Civ. P. 26(c) authorizes protective orders to prohibit discovery that would cause "annoyance, embarrassment, oppression, or undue burden or expense." These deposition requests are a clear case of an attempt to use depositions to annoy, embarrass, oppress, and burden. These depositions should be prohibited on that ground alone. That Plaintiffs would seek, for example, to leverage Mr. Irsay's personal struggle with pain medication to justify a deposition is improper regardless of his level of seniority.

Moreover, the "apex doctrine" recognizes that depositions of high-level officers raise a "tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007); *see also M.H. v. Cty. of Alameda*, 2013 WL 5497176, at *1 (N.D. Cal. Oct. 3, 2013). Under the "apex doctrine" the Court should "carefully scrutinize[]" the purported reason for deposing a high-level officer and intervene to prohibit the deposition unless satisfied that the officer possesses relevant, firsthand knowledge that is otherwise unavailable. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 10967617, at *1 (N.D. Cal. Aug. 1, 2011); *see also Apple Inc. v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). In determining whether to allow the deposition of a high-level officer, the Court asks: "(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." *M.H.*, 2013 WL 5497176, at *1 (quoting *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011)). Plaintiffs cannot satisfy either element of this test.

As the highest-level executives of their organizations, Messrs. Jones and Irsay are prototypical "apex deponents" to whom the "apex doctrine" applies. Plaintiffs may not justify deposing them on the ground that, as high-level officers with oversight of their team's management, they *might* have access to relevant information. "Adopting this argument ... would eviscerate the apex doctrine." *In re TFT-LCD*, 2011 WL 10967617, at *2; *see also Affinity Labs of Tex. v. Apple, Inc.*, 2011 WL 1753982, at *15 (N.D. Cal. Apr. 3, 2015) ("[Plaintiff] misstates the standard for deposing a CEO, [by] claiming it is sufficient to show ... 'firsthand knowledge of relevant information.'"). There must be a showing of *unique* knowledge of material facts.

No such showing can be made here. Neither the original complaint nor Plaintiffs' proposed amended complaint alleges that Mr. Jones or Mr. Irsay had any involvement with, or unique knowledge of, the medical care received by any of the named plaintiffs—or, for that matter, any other player. Rather, the complaint recognizes that team physicians, assisted by athletic trainers, are responsible for players' medical care. Plaintiffs have failed to identify any subject matter on which Mr. Jones or Mr. Irsay would have knowledge unique from these or other individuals of lesser seniority. In the absence of any assertion that Messrs. Jones or Irsay treat or diagnose players or provide them with medications, whatever knowledge they have on those subjects is necessarily secondhand, provided to them by the training and medical staff. This is not the sort of "unique personal knowledge required to compel a deposition of a CEO." *Doble v. Mega Life & Health Ins. Co.*, 2010 WL 1998904, at *3 (N.D. Cal. May 18, 2010); *see also Affinity Labs*, 2011 WL 1753982, at *15 (prohibiting deposition when defendant "produced [other] witnesses with firsthand knowledge of the statements").

Plaintiffs' other stated reasons for seeking these depositions fare no better. They seek Mr. Jones' deposition because he made public statements about the injury status of current Cowboys

players. Those statements, however, do not relate to plaintiffs in this case or to any putative class member; they are instead about current (non-retired) players. Moreover, courts have rejected the proposition that public statements on issues beyond the scope of litigation can serve as valid grounds for an apex deposition. *See, e.g.*, *Affinity Labs*, 2011 WL 1753982, at *11, *13. And neither Plaintiffs' original nor proposed amended complaint alleges that Mr. Jones' participation in league committees has any relevance to their claims.

Plaintiffs seek Mr. Irsay's deposition because he has struggled with drug dependency and was arrested in 2014 while in possession of prescription medication that Plaintiffs believe he may have received from the Colts' team physician. Mr. Irsay's 2014 arrest is in no way relevant to Plaintiffs' allegation of a scheme to prescribe medication *to players* for the purpose of returning them to the field. Given the deeply personal, and completely irrelevant, nature of the subject on which Plaintiffs seek to depose Mr. Irsay, their request appears designed solely "for abusive rather than appropriate fact-finding purposes." *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 2014 WL 939287, at *3 (N.D. Cal. Mar. 6, 2014). Additionally, Mr. Irsay's knowledge on even this irrelevant subject is not unique. Dr. Rettig, the team physician for the Colts since 1984—who Plaintiffs will depose—can address whether he provided Mr. Irsay with the medications in question. *See Icon-IP Ltd. v. Specialized Bicycle Components, Inc.*, 2014 WL 5387936, at *2 (N.D. Cal. Oct. 21, 2014) (granting protective order when plaintiff "has noticed, but not yet conducted depositions of other individuals involved").

In addition, before allowing an apex deposition, "[c]ourts regularly require interrogatories, requests for admission, and depositions of lower level employees." *Affinity Labs*, 2011 WL 1753982, at *6; *see also Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2006 WL 2578277, at *3 n.3 (N.D. Cal. Sept. 6, 2006). Plaintiffs have failed to pursue, let alone exhaust, these alternative means. They have not deposed any member of the Colts or Cowboys medical or athletic training staffs. *See First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, 2007 WL 4170548, at *2 (N.D. Cal. Nov. 19, 2007) (citing *Salter v. Upjohn*, 593 F.2d 649, 651 (5th Cir. 1979) ("Courts generally ... refuse to allow the immediate deposition of high level ... executives, *before* the testimony of lower level employees."). Nor have they sought written discovery on the topics they wish to explore in these depositions. At a minimum, Plaintiffs must exhaust such less intrusive means of discovery before seeking to take these burdensome, unnecessary depositions. *See, e.g.*, *Celerity, Inc.*, 2007 WL 205067, at *5 (requiring a showing that "interrogatories or the depositions of lower-level employees have failed to provide the discovery" sought prior to allowing apex deposition).

For the foregoing reasons, Defendants respectfully request that the Court issue a protective order prohibiting the depositions of Mr. Jones and Mr. Irsay, or, at a minimum, deferring them unless and until such time as Plaintiffs exhaust all less intrusive means of discovery.

Sincerely,

/s/

Sonya D. Winner
Counsel for Defendants

Attachments
cc: All counsel of record (by ECF)

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November 1, 2016

Via e-mail

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201 N. Charles Street, Suite 2600
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Re: *Evans v. Arizona Cardinals Football Club, LLC, et al.* (N.D. Cal.)

Dear Bill:

This letter summarizes our prior discussions regarding plaintiffs' requests to take the depositions of Jerry Jones and Jim Irsay, the owners of the Dallas Cowboys and Indianapolis Colts, respectively.

Plaintiffs originally requested that each of the 32 defendant teams provide a 30(b)(6) witness on nine broad topics, with an initial emphasis on four of those topics. We were prepared to proceed with these depositions beginning in September. Nonetheless, after correspondence in which we discussed the Court's Supplemental CMO pertaining to 30(b)(6) depositions and only a few days before those depositions were to begin, you informed us that you were withdrawing or postponing those requests and would be coming back to us with a new deposition proposal.

On October 17, you called to advise that plaintiffs had a new list of fifteen desired deponents, including Messrs. Jones and Irsay. I asked the reason for seeking to depose these two owners. On Mr. Jones, you referred me to paragraph 101 of the complaint, which attributes to him a quote regarding Tony Romo, a current player who is not a member of the putative class—"Cowboys' owner Jerry Jones stated '[Romo's] going on the trip to London and logic tells you that we wouldn't have him make that trip to London and back if we didn't think he was going to play.'" On Mr. Irsay, you advised that it was because of his 2014 plea to a misdemeanor count of driving while intoxicated. You said that it was your understanding on "very good authority" that Mr. Irsay had been arrested with pills that came from the Colts team doctor. I noted that, while we would consider your request as to both owners, we did not see either point as being relevant or likely to lead to the discovery of admissible evidence with respect to any issue, and certainly not to any central issue, in this case.

We discussed this again on October 20. Steve Grygiel and Stacy Eisenstein were also on that call. I again asked you (and Steve) to explain the basis for seeking to depose Messrs. Jones and Irsay. The same reasons discussed above were reiterated. No additional ones were provided, unless one counts Steve's statement that he believes that Mr. Jones is a "hands on" owner.

As you know, "deposition notices directed at an official at the highest level ... create a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). In seeking to depose these owners, plaintiffs would have to demonstrate: "(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." *In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct,. 19, 2011); *see also Affinity Labs of Tex. v. Apple, Inc.*, 2011 WL 1753982, at *15 (N.D. Cal. Apr. 3, 2015) (same).

Plaintiffs cannot make either showing. As to unique, first-hand, non-repetitive knowledge, the quotation attributed to Mr. Jones about Tony Romo's likely availability for a game in London does not reflect unique knowledge; it also is not related to a fact at issue in this case. Among others, the Cowboys athletic trainer and team physician (and Mr. Romo) had knowledge of his playing status. And Mr. Romo, a current player, is not a putative class member. Furthermore, none of the named plaintiffs who played for the Cowboys did so at a time when Mr. Jones owned the team.

The circumstances surrounding Mr. Irsay's 2014 arrest also have nothing to do with the claims plaintiffs bring here. Your desire to depose him regarding that arrest would be abusive and harassing. Moreover, you are taking the deposition of the Colts' longtime team physician, Dr. Rettig, who can—despite the irrelevance of the question—answer whether any of the controlled substances that Mr. Irsay had with him at the time of his arrest were provided by a team doctor. (They were not.)

Furthermore, when I asked you to please identify any specific questions or issues about which you thought that Mr. Jones or Irsay had unique knowledge, you refused to do so.

Notwithstanding my encouragement to pursue other less intrusive discovery methods to address whatever subjects you wish to explore with these witnesses, plaintiffs obviously have not done so to date, and you declined to consider less intrusive methods such as interrogatories, requests for admission, or deposition by written question. It is, at the very least, premature to seek to depose these team owners (or any team owner, for that matter) before deposing the team doctors or athletic trainers about whose alleged conduct plaintiffs complain.

In these circumstances, if plaintiffs persist in seeking the depositions of Mr. Jones and/or Mr. Irsay, we will have no choice but to move for a protective order.

Sincerely,

/s/
Benjamin C. Block

cc: Stacy Eisenstein, Esq.
Steven Grygiel, Esq.

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November 2, 2016

VIA E-MAIL

Benjamin C. Block, Esq.
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Stacy Eisenstein
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RE: *Evans, et al. v. Arizona Cardinals, et al.*, Case No. 16-cv-01030 (N.D. Cal.)

Dear Ben and Stacy:

I am writing in response to your letter dated November 1, 2016 that purports to summarize our prior discussions regarding plaintiffs' request to depose Messrs. Jones and Irsay.

You begin the letter with an incomplete summary of previous discussions about depositions in this matter.

We first served corporate designee topics on August 4. Four days later, we provided finalized topics, which added a single topic to the eight previously identified. Your characterization notwithstanding, these topics were narrowly tailored to the core issues in this case – your clients' illegal administration of medications to their players.

You waited until September 15 – 42 days after receiving the topics, 38 days after receiving the final topics, 12 days before the first date you proposed for depositions, and on the day that you first identified a date for a deposition (*i.e.*, prior to September 15, you had not identified dates for any depositions) – to serve objections, after I told you earlier that day that "I'm concerned about getting objections so late in the game" and that I wanted "objections resolved before the depositions began."

While we had previously discussed you having until September 16 to lodge objections, when we had that discussion on or about September 2, you had not yet identified dates for the depositions and thus there was no timing concern about resolving objections in advance of the depositions taking place. Moreover, I did not anticipate that you would lodge seven recurring objections to the topics we proposed and a number of additional objections to the four designee topics that were truly at issue (for a grand total of almost 40 objections to four topics). Had I known that Defendants would fail to adhere to the Northern District of California's Guidelines for Professional Conduct regarding objections and depositions, I would not have agreed to wait so long for you to lodge objections.

Lastly, our correspondence after September 15 on the topic of corporate designee depositions also included your statement that we would get only one chance to depose the designees and that if we did so in advance of your document production being complete - and as of the writing of this letter, I understand it will not be complete until early December at the earliest - you would not allow the designee to be re-deposed. While not necessarily an unfair position, that statement ended any hope Plaintiffs had to get meaningful depositions done before the October 31 date to amend, which I had told you on numerous occasions was the sole reason I was pushing for early depositions.

Your recent e-mail stating that Defendants "are not inclined to agree to any proposed change to the Case Management Order deadline for seeking leave to file amended pleadings" confirms what I suspected – if we had waited to take depositions after receiving your documents, we would not have had your consent to seek leave based on information learned therein. I'm not saying that to fault your position; only to underscore my reasoning for wanting the depositions early and then moving off that position when I learned we would not be able to get what Plaintiffs legitimately wanted.

Turning to the matter of Jones and Irsay, as we have now discussed/corresponded about on at least two occasions, the purpose of my call on the 17th was solely because I had promised to email you the names of the new deponents on the 14th and our email server was migrated earlier than I had been told it would be, preventing me from sending that email. I was not prepared to discuss the reasons for the depositions on that call, and I don't think I'm obligated to tell you why I want to take particular depositions, especially at the time I identify them (it may be appropriate thereafter in response to questions from opposing counsel). I am thus not sure why you raised it in your November 1 letter.

In any event, if we are going to discuss it, we should do so correctly. We do not seek to depose Mr. Irsay because of his 2014 plea. We seek to depose him, as I told you on the 17th, because of the painkillers found in his possession when he was arrested which we understand were obtained, at least in part, from team doctors. Mr. Irsay's public statements, reflecting his extremely close involvement with his players, further confirms the propriety and necessity of his deposition.

With regard to our October 20th call, I disagree that "the same reason discussed above were reiterated" for Mr. Jones. Steve advised you on that call that Mr. Jones was not an "Apex" deponent, but, rather, a witness with personal knowledge of issues directly relevant to claims in this case. And I also disagree that we refused to identify any specific questions or issues about which we thought Mr. Jones or Irsay had unique knowledge. This letter reiterates the issues we have already identified. Steve identified additional specific information on today's call, discussed below in greater detail. Plaintiffs are not compelled to "to consider less intrusive methods" because this is not an Apex deposition situation, as Steve described today, in which a party seeks to depose the CEO of a major corporation about a personal injury resulting from a failed widget in a far-away facility that the CEO never visited and about which malfunctioning widget the CEO had no knowledge. Besides, I am not sure how you can say we have not considered "less intrusive methods" anyway, as you cannot know what we have or have not considered.

In any event, the issues identified in the paragraph above lead to a central concern that I identified in today's call – it seems like you are trying to play "gotcha" regarding Jones and Irsay's depositions rather than engage in a meaningful dialogue. If, after that back and forth is complete (and as this letter should make clear, from our perspective, it is not) we have not reached agreement, we can let the Court decide the matter. But let's please reach that point first.

With these preliminaries addressed, we can finally get to the main event.

As discussed with you in some detail today, we disagree that the Jones and Irsay depositions are Apex depositions. In the interests of trying to avoid unnecessary motion practice, and in service of Steve's request that you reconsider your position on these two depositions, we summarize in more detail than we otherwise might the points we made today.

- Given the morass of objections, and resulting meet-and-confers, concerning paper discovery, the paucity and pace of your clients' document production, and the tremendous pressure created by the current case deadlines, Plaintiffs have no choice but to start deposing witnesses whose statements demonstrate they have direct, personal, relevant knowledge.

- These are not "Apex" depositions at all. Of the 32 club owners, we selected Messrs. Jones and Irsay because they have, or we reasonably expect them to have, personal knowledge and information directly relevant to the case's core issues.

- The Clubs, specifically the Cowboys and the Colts, are not akin to big companies with myriad layers of management and bureaucracy that insulate owners and senior executives from knowledge about operational issues. The managerial hierarchies are much smaller and less complex, and Messrs. Jones and Irsay are intimately involved with their teams and players.

- The Apex doctrine is in tension with, and must be applied in light of, the rules requiring broad discovery, including deposition discovery

- The Apex doctrine's purpose is to prevent harassment of senior executives whose knowledge about relevant case issues is either non-existent or remote. That is not the case as to either Mr. Jones or Mr. Irsay. Just as it was not in the *In re NHL Players' Concussion Litig.* with respect to Commissioner Bettman's deposition.

- Mr. Jones, among other things:

- Has been the Cowboy's Owner since 1989;
- Took over as Cowboys General Manager in 1989;
- Is currently the Cowboys Owner, President, and General Manager;
- Served on the NFL Health and Safety Advisory Committee;
- Served on the NFL Management Council Executive Committee;
- Served two terms on the NFL's Competition Committee;
- Is well known for his heavy, direct involvement in his team's day-to-day doings, as a General Manager would be; and
- Has made, as publicly available sources reflect, numerous public statements reflecting his direct knowledge of, and involvement in player health issues. *See, e.g.,*
  - 11/1/16 ("I do think that unquestionably Tony [Romo] is going to be ready to go at some point near the end of the year, and we'll evaluate things at that time.");
  - 10/31/16 ("Tony Romo is still not physically ready to play.");
  - 8/31/16 (discussing Sean Lee knee injury on 105.3 "The Fan:" "He's not hurt at all…Nobody, apparently the trainer knew, but [Executive V.P.] Stephen [Jones] didn't know. Nobody in our organization knew that Lee was getting an MRI but the trainer. I'm gonna kick his ass for not sending me a note….But the bottom line is there's nothing wrong with Sean Lee. From time to time he likes to get an MRI or take a looks at what he's doing. Generally we get a report the minute…no matter where I would happen to be, from the training room. They call my desk immediately because we do know it's a very sensitive thing and one we have to be right on top of.");
  - 9/20/15 (Mr. Jones "talked to Romo about his injury" and was with Mr. Romo when he learned the diagnosis).

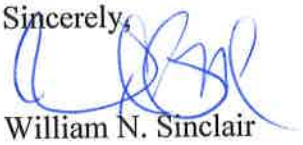
- As for Mr. Irsay:
  - He has long been well known for his close involvement with his team, personnel decisions, and his players;

- Has long been known, by his own admission, to have struggled with drug dependency/painkiller addiction;
- In 2014 was pulled over and found by police to have numerous bottles of pills in a laundry bag on the front seat of his vehicle; and
- We have information that Mr. Irsay obtained pills from his own club's personnel.

- The Apex doctrine – too often reflexively invoked – does not, consistent with Fed. R. Civ. P. 1 and 26, preclude depositions of senior executives where they have direct personal knowledge. *See, e.g., Minter v. Wells Fargo Bank,* 258 F.R.D. 118, 126 (D. Md. 2009) (CEO's deposition proper where CEO was highly involved in business practices at issue); *In re Bridgestone/Firestone Prods. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002) (Board Chairman properly deposed in products liability case where he had personal knowledge of, and had been involved in, relevant matters and where conduct of highest corporate executives was at issue); *Chevron Corp. v. Donziger*, 2013 WL 1896932, at * 1 (S.D. N.Y. May 7, 2013) (permitting deposition of Chevron's Chairman and CEO, stating "principles relating to apex witnesses are in tension with the broad availability of discovery," and "there is little doubt that [the witness] has relevant knowledge" with "experience likely to have given him personal knowledge of the environmental issues underlying the…litigation"); *In re Google Litig.*, 2011 WL 4985279, at * 2 (N.D. Cal. Oct. 19, 2011) (Google CEO Larry Page deposition proper in patent case where plaintiff showed Page had direct knowledge of and personal involvement in technologies at issue); *In re Mentor Corp OBTape Transobturator Sling Prod. Liab. Litig.*, 4:08-MD-2004 (CDL), ECF No. 133 at p. 2 (M.D. Ga. Dec. 1, 2009) (approving depositions of World Wide President and of founder/former CEO; "where the executive has personal knowledge of and involvement in certain relevant matters or where conduct and knowledge of the highest corporate levels are relevant in the case, a deposition of the executive is generally permitted)."

We could cite additional cases and make additional arguments. But the above should suffice for present purposes, and explains our position here in more detail than might be required. We do so in hopes that we can avoid burdening the Court with unnecessary motion practice that further slows our progress. We also do so anticipating that you will respond in good faith and agree to the prompt scheduling of these two depositions.

Sincerely,



William N. Sinclair

Cc: Plaintiffs' Counsel (*via* E-mail only)

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November 7, 2016

Via e-mail

Bill Sinclair, Esq.
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Re: *Evans v. Arizona Cardinals Football Club, LLC, et al.* (N.D. Cal.)

Dear Bill:

This responds to your letter of November 2. The "preliminaries" of the first three pages of that letter address issues largely not germane to the topic of depositions of Jerry Jones or James Irsay. We disagree with your characterizations there of our discussions, which are inconsistent with both the substance and tone of our prior conversations, as the attached correspondence demonstrates.

As to the issue at hand, the record confirms that while plaintiffs initially requested 30(b)(6) depositions of the Clubs, they now want some of the first depositions in the case to be those of the two highest-ranking officials at the Cowboys and Colts.

The fact that Mr. Jones is also the Club General Manager does not make him any less of an "apex" deponent. If plaintiffs wish deposition testimony about the medical care provided to Cowboys players while Mr. Jones has owned the team, they should depose Jim Maurer, the Cowboys' Head Athletic Trainer, who has been with the Club since 1990. If plaintiffs wish deposition testimony about the medical care provided to Duriel Harris, the only plaintiff who played for the team, they should seek the deposition of the team doctors and athletic trainers identified in our interrogatory responses who, unlike Mr. Jones, were with the Cowboys in 1984 when Harris played. And if plaintiffs wish deposition testimony about League health committees, they should discuss that with Dr. Pellman, the longtime medical advisor to the NFL, whose deposition you are taking.

The record also confirms that plaintiffs wish to depose Mr. Irsay about his 2014 arrest. We disagree with your view that this is an appropriate, non-abusive, non-harassing basis for deposition. The record further confirms that plaintiffs have refused to consider serving written discovery requests regarding whether the painkilling medications that Mr. Irsay had with him at the time of his arrest were provided by any team personnel. (Again, they were not.)

At bottom, given plaintiffs' blanket refusal to consider alternative, less-intrusive discovery means than deposing the two highest-ranking Club officials at these two Clubs, we appear to have a disagreement about whether the apex doctrine principles apply. On this question, other than the *Google* case, none of the cases cited in your letter are from the Ninth Circuit or the Northern District of California. And *Google* makes clear that the apex requirements cited in our letter of November 1 do apply. *See In re Google Litig.*, 2011 WL 4985279, at *2 (N.D. Cal. Oct. 19, 2011) ("Page and Brin are clearly high-level executives whose depositions must satisfy the 'apex' requirements."). In *Google*, the court permitted the deposition of Google CEO Larry Page, the named inventor of the patent-in-suit and multiple relevant prior art patents, only *after* plaintiffs had first deposed six other Google employees and demonstrated to the Court that they were unable to obtain the discovery they needed from those depositions. *See id*. The record here is markedly different.

We regret that we were not able to resolve this dispute without the need for court intervention. We appreciate the multiple opportunities to confer with you in an effort to do so. We will promptly submit a letter to Judge Alsup seeking a protective order, and will include your letter of November 2 as an exhibit for the Court's convenience.

Sincerely,

/s/
Benjamin C. Block

Encl.

cc: Stacey Eisenstein, Esq.
Steven Grygiel, Esq.

Block, Benjamin

From: Bill Sinclair <bsinclair@mdattorney.com>
Sent: Friday, September 23, 2016 11:43 AM
To: Block, Benjamin; Castello, Brian
Subject: RE: Emailing: 2016-08-03 Draft ESI Order.docx

Ben,

Thanks for your e-mail. I think that, for the most part, it accurately recaps the positions you took on our call.

We appreciate your candor and are carefully considering the information you provided regarding potential corporate designee witnesses' current state of knowledge and what they might know later. Based on those representations, for now, we will forego the Green Bay and Philadelphia corporate designee depositions, reserving the right to re-note those depositions on a mutually-agreeable date. Further, we will hold off on any other depositions at the moment. We'll have a proposed deposition plan to you by October 7 at the latest.

WNS

-----Original Message-----
From: Block, Benjamin [mailto:bblock@cov.com]
Sent: Thursday, September 22, 2016 5:29 PM
To: Bill Sinclair; Castello, Brian
Subject: RE: Emailing: 2016-08-03 Draft ESI Order.docx

Bill,

Thanks for your time and your note. Yes, we will come back to you on the ESI order, and yes, the asterisk and exclamation points were intended to mean the same concept (root expander). Thank you also for your proposed revisions to search terms for the Club documents, which we are reviewing and will test for hits on at least a sample of Clubs to identify issues for further discussion.

I also wanted to memorialize our discussion on 30(b)(6) depositions. We discussed paragraph 23 of Judge Alsup's Supplemental Case Management Order, which requires (and limits) 30(b)(6) topics to up to ten described with "reasonable particularity," and which provides that when "a notice includes an overbroad topic, the overbroad topic shall be unenforceable and may not be later replaced with a proper topic." That paragraph also provides that "if an organization cannot reasonably locate a witness to testify based on personal knowledge, there is no requirement under Rule 30(b)(6) for the organization to 'woodshed' or to 'educate' an individual to testify on the subject."

In our view, each of the noticed topics, seeking to cover a 45-year period on very broad topics, is overly broad and not described with "reasonable particularity." In addition, most, if not all, Clubs do not have an individual within their control with personal knowledge of the requested subject matter covering more than a portion the time period. Furthermore, in seeking 30(b)(6) depositions at this early stage, before document production is substantially complete (indeed, before we've even agreed on search terms for electronic documents), the designated witnesses cannot reasonably be expected to be prepared on all information that is still being identified, reviewed, and produced. We reiterated our position that these witnesses will be presented one time only, and that if Plaintiffs elect to take the depositions now before receiving additional documents, they are doing so with that full knowledge and understanding. You indicated that you understood our position and recognized that you would face an "uphill battle" seeking additional testimony based on documents that are produced later.

We further advised that, if Plaintiffs elect to proceed with these depositions now, the best we would be able to do would be to designate a witness with some tenure at the Club who would have some personal knowledge of the topics for some period of time. We also discussed and requested that you provide some further specificity or clarity regarding your Topic No. 9.

We also discussed again whether plaintiffs might instead wish to identify a subset of Clubs for deposition a little later, when more documents have been produced, perhaps based on a review of the tenure of current Club trainers and doctors which can be identified from Appendix B to our Interrogatory responses. I also mentioned that if you have specific types of documents, etc. that you want to prioritize for the production queue we are amenable to exploring that with you.

We understood that you were going to consider our discussion further and come back to us by Friday noon whether you wish to proceed with the depositions in Green Bay and Philadelphia next week.

Regards,
Ben

-----Original Message-----
From: Bill Sinclair [mailto:bsinclair@mdattorney.com]
Sent: Wednesday, September 21, 2016 3:21 PM
To: Block, Benjamin; Castello, Brian
Subject: RE: Emailing: 2016-08-03 Draft ESI Order.docx

Gents,

Thank you for the time today. I understand you will review the proposed ESI order and get back to me about it. As we discussed, there are likely some necessary changes given the time that has elapsed since we first sent it to you, but I think the bulk of it still applies. As we review your production, if we encounter any concerns regarding the manner in which the documents were produced, I will let you know.

Further, I understand that the asterisks and exclamation points were meant to mean the same thing and will convey the same to my folks. And as we discussed, we have applied your search terms to our ESI and, once I receive reports of the hits those terms generated, we can further discuss those proposed search terms. At the same time, or hopefully earlier, we will get you our thoughts on the proposed terms for your ESI.

Finally, I will let you know about the proposed Green Bay and Philadelphia corporate designee depositions by midday Friday.

WNS

-----Original Message-----
From: Bill Sinclair
Sent: Wednesday, September 21, 2016 2:06 PM
To: Block, Benjamin (bblock@cov.com); Castello, Brian (BCastello@cov.com)
Subject: Emailing: 2016-08-03 Draft ESI Order.docx

Your message is ready to be sent with the following file or link attachments:

2016-08-03 Draft ESI Order.docx